IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Eric Prudhomme, *et. al*, Individually and on behalf of others similarly situated — Civil Action 15-00098

v. — Judge Robert G. James

GEICO Casualty Insurance Company, *et al.* — Magistrate Judge Carol B. Whitehurst

REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ELVIN JACK CLAIMS OR, IN THE ALTERNATIVE, MOTION TO COMPEL APPRAISAL

The Court should grant GEICO Casualty Company's Motion for Partial Summary Judgment because Plaintiffs concede they have no valid claims against GEICO Casualty. There is simply no valid basis for GEICO Casualty to remain a defendant. GEICO Casualty's Motion to Compel Appraisal was an alternative motion, but because Plaintiffs have conceded they have no valid claims against GEICO Casualty, once judgment is granted in GEICO Casualty's favor, its Motion to Compel is moot. Should the Court still reach whether Mr. Jack's insurer is entitled to appraisal under the Policy,[1] however, it should compel appraisal because the appraisal was timely demanded, appraisal can be completed, and appraisal is not irrelevant to Mr. Jack's claims.

I. PLAINTIFFS CONCEDE GEICO CASUALTY IS ENTITLED TO JUDGMENT IN ITS FAVOR

Plaintiffs now concede that GEICO Casualty was improperly named as a Defendant because neither Plaintiff has a claim against GEICO Casualty. Doc. 54 at 5-6. With their Response to GEICO Casualty's Motion for Partial Summary Judgment, Plaintiffs moved for

[1] The mooting of GEICO Casualty's Motion to Compel Appraisal has no bearing on any future motion GEICO General Insurance Company might make to compel appraisal. *See* Mot. for Partial Summ. J., Doc. 51 at 9-10 (making the uncontroverted argument that GEICO Casualty and GEICO General are separate entities).

leave to amend their complaint to purportedly correct this error by adding GEICO General Insurance Company, Mr. Jack's insurer. *Id.* at 6. Instead of voluntarily dismissing GEICO Casualty, Plaintiffs' proposed amended complaint continues, without basis, to assert claims against GEICO Casualty. *See* Doc. 54-1 at 2 (continuing to identify GEICO Casualty as a Defendant, falsely alleging Plaintiffs were GEICO Casualty policyholders, and seeking relief against GEICO Casualty). Plaintiffs have neither addressed nor explained their failure to assert a valid claim against GEICO Casualty while continuing to name it as a Defendant. Judgment should be entered in GEICO Casualty's favor.[2]

II. GEICO TIMELY DEMANDED APPRAISAL, APPRAISAL CAN BE PERFORMED, AND IT IS NOT IRRELEVANT

A. GEICO Timely Demanded Appraisal

Plaintiffs' assertion that Mr. Jack's expression of general dissatisfaction with GEICO General's payment to him started the clock to demand appraisal under the Policy is not supported by the Policy, the case law, or common sense. As a precondition to appraisal under the Policy, GEICO and Mr. Jack had to "not agree on the amount of loss." Defs' Separate Statement of Facts in Supp. of Mot. for Partial Summ. J., Doc. 51-2 ("SOF") ¶ 20. *Triple K, Inc. v. Century Surety Co.*, which Plaintiffs rely upon, discussed what is necessary for this precondition to be met: "As long as the insurer 'had sufficient information to act on the claim,' it was the insurer's responsibility to respond 'either by compensating [plaintiff] under the policy or disputing the claim via the appraisal process.'" No. CIV.A. 10-1236, 2010 WL 3418237, at *2 (E.D. La. Aug. 23, 2010) (alterations in original) (quoting *Nguyen v. St. Paul Travelers Ins. Co.*, No. CIV A 06-4130, 2007 WL 1672504, at *4 (E.D. La. June 6, 2007).

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[2] Whether Plaintiffs should be granted leave to amend their complaint to assert a claim against GEICO General and whether GEICO Casualty is entitled to judgment in its favor are separate questions. Defendants will respond to Plaintiffs' Motion to Amend Complaint (Doc. 55) on the schedule set by the Court. *See* Doc. 57.

"Sufficient information" requires, at a minimum, presentation of a competing value. In *Triple K*, the insured provided the insurer "a detailed inventory report . . . which included a comparison of the loss claimed to the wholesale prices of each item claimed." *Id.* In *Nguyen*, the insured provided a letter from counsel and a statement from an adjuster that identified that overhead and profit, which the adjuster claimed should be between 30 and 35%, was not included in the insurer's estimate and asked the insurer to address it immediately. 2007 WL 1672504, at *4. In *Beasley v. GeoVera Specialty Insurance Co.*, the insured "sent a letter itemizing the known property damage" to the insurer. No. CIV.A. 13-395, 2013 WL 3187289, at *2 (E.D. La. June 20, 2013). The court distinguished an initial claim and a second request for additional living expenses as insufficient, comparing the sufficient itemization as similar to the "detailed inventory report" in *Triple K*. *Id.* at *4.

Mr. Jack presented no competing value or counter demand before he filed suit, and he does not argue that he did. The extent of Mr. Jack's complaint about GEICO General's valuation included a telephone call where he claimed he was "unhappy" and another telephone call where he claimed he received a "much higher" estimate somewhere else. SOF ¶ 6, P's Resp. at 3. With such general statements, and without presentation of a competing value, GEICO General did not have "sufficient information to act on the claim." It could not have analyzed, evaluated, or paid a vague "much higher" amount to resolve the claim and had no way of knowing if Mr. Jack really believed he could support a higher recovery, or was just hoping to extract more money via puffery. Plaintiffs' position that a generic complaint suggesting a customer would like more money triggers the requirement to demand appraisal under insurance policies is unworkable and unrealistic. Instead of promoting cost effective resolution of claims, it would impose the costs of an appraisal (under the Policy, each party bears the cost of its appraiser) on both insurers and customers with no demand or written presentation of an actual dispute as to the amount of the loss.

As is clear from the case law, general sentiment and dissatisfaction is not a dispute over value. The first time Mr. Jack presented a competing value was when he filed the First Supplemental and Amending Petition for Property Damages, Penalties, Attorney's Fees and for Class Certification on March 4, 2015, which was served on GEICO Casualty *on March 28, 2015*. It is undisputed that GEICO timely demanded appraisal within 60 days of receiving this notice that Mr. Jack disputed the valuation. SOF ¶ 21 (discussing and attaching GEICO's May 4, 2015 appraisal demand).

B. Appraisal Can Be Completed Without The Vehicle

With no support, Plaintiff falsely asserts that appraisal cannot be completed because Mr. Jack no longer owns the vehicle and "inspection is simply impossible at this late juncture." Doc. 54 at 4. The Court should not consider such unsupported lawyer argument. *See United States v. Willis*, 639 F.2d 1335, 1338 (5th Cir. 1981) ("All we will say about the lawyer's argument is that it was not evidence, and the jury cannot make a finding that is unsupported by some evidence."); *Jordan v. Aries Marine Corp.*, No. CIV.A. 14-377, 2015 WL 151336, at *3 (E.D. La. Jan. 12, 2015) ("A lawyer's argument . . . is *not* evidence and is insufficient as a matter of proof to establish *fact*.") (emphasis in original).

Moreover, assuming the Court gives any weight to the unsupported lawyer argument (which it should not) Plaintiffs' counsel's contention is wrong. Based on the only evidence before this Court, an appraisal can be performed. According to Kevin Flanigan, a master certified machinery and equipment appraiser with over 30 years of appraisal experience, appraisals can be completed without a vehicle inspection and are "commonly and routinely done, provided there is no dispute on how the vehicle is equipped or its condition." Decl. of Kevin

Flanigan, attached as Ex. 1. Mr. Flanigan notes that vehicles that are not recovered from a theft are unavailable for inspection and estimates appraisals are completed approximately on 378,000 of such vehicles for insurance claims annually. *Id.*

C. Appraisal Is Relevant To The Claims In This Lawsuit

Each of Mr. Jack's claims require him to prove GEICO General (not GEICO Casualty) underpaid his claim. Mr. Jack's focus on a single allegation does not eliminate this requirement. According to Mr. Jack, this case is only about whether CCC Valuescope complies with LSA-R.S. 22:1892(B)(5). That statute, however, provides no independent remedy for Mr. Jack. *See* LSA-R.S. 22:1892. A simple violation of that statute (which Defendants did not do) is not the basis of a claim, and Plaintiffs point to no statute that converts a violation, without a corresponding underpayment, into a claim.

Mr. Jack's breach of contract claim requires him to prove a breach that caused damage. *Bruneau v. Crescent City Cleaning Servs. Corp.*, 16-17 (La. App. 5 Cir. 12/14/16), 209 So. 3d 286, 290 (citing *Sanga v. Perdomo*, 14–609 (La. App. 5 Cir. 12/30/14); 167 So.3d 818, 822, *writ denied*, 15–222 (La. 6/19/15); 172 So.3d 650). Mr. Jack's fraud claim also requires him to prove resultant damage. *Cope v. Citimortgage, Inc.*, No. 2:10 CV 922, 2010 WL 4976868, at *2 (W.D. La. Dec. 1, 2010) (citing *Foley & Lardner, LLP v. Aldar Invs., Inc.*, 491 F.Supp. 2d 595 (M.D. La. 2007)). The alleged damage is underpayment of the total loss value of the vehicle. Petition ¶¶ 24-27, 37. If GEICO General's valuation of the vehicle was reasonable, Mr. Jack has no damages and no breach of contract or fraud claim.

Mr. Jack's "bad faith" claim, which arises out of the statutory duty imposed by LSA-R.S. 22:1973(A) and (B)(5), also requires him to prove GEICO underpaid the claim. Under subsection A, "[a]ny insurer who breaches [the duty of good faith and fair dealing] shall be liable for any damage sustained as a result of the breach." Under subsection B(5), "[f]ailing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause," constitutes a breach of the duty of good faith and fair dealing. Each section requires underpayment as a precondition to liability.

Contrary to Plaintiffs' contention, appraisal will determine ***the central question*** to ***all*** of Mr. Jack's claims. Even if Plaintiffs are correct that GEICO's use of the CCC Valuescope system violated LSA-R.S. 22:1892(B)(5) (they are not), that violation does not support any claim against GEICO without an underpayment. If GEICO General paid a sufficient amount, using CCC or throwing darts, then how it arrived at that amount would not matter in any way because Mr. Jack would have no damages and no claim. Appraisal will determine if GEICO General underpaid Mr. Jack's claim and may resolve his lawsuit.

Moreover, it is important to note that, as opposed to Plaintiffs' characterization of the statute, LSA-R.S. 22-1892(B)(5) expressly allows use of appraisal as an approved method for determining value (as one of multiple approved methods). LSA-R.S. 22-1892(B)(5)(c). Mr. Jack has, through the Policy, agreed to proceed with appraisal and to be bound by the amount determined through appraisal. *See* SOF ¶ 20 ("An award in writing of any two will determine the amount of the loss."). GEICO timely demanded appraisal and Mr. Jack is refusing to participate. The Court should compel Mr. Jack to appraisal.

III. CONCLUSION

The Court should enter judgment on Mr. Jack's claims because he has presented no facts supporting any claims against either Defendant.

If the Court reaches the appraisal question, it should compel appraisal as required by the Policy.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to all counsel of record that are registered with the Court's CM/ECF system or by United States Mail, postage prepaid.

/s/Ian Fischer